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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 8, 1993

Donna R. Searcy
Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

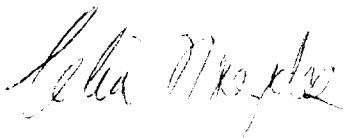
Dear Ms Searcy:

Re: *RM-8181 - Inmate Calling Services Providers Tasks Force for Declaratory Ruling*

On behalf of Pacific Bell and Nevada Bell, please find enclosed an original and six copies of its "*Comments*" in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,



Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of the Petition)
of the Inmate Calling)
Services Providers Tasks Force)
for Declaratory Ruling) RM-8181

COMMENTS OF PACIFIC BELL AND NEVADA BELL

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Date: March 8, 1993

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SUMMARY

The Pacific Companies' Comments respond to APCC's Petition for a Declaratory Ruling carving out inmate public telephones from the Part 68 exemption for public telephones.

1. A Petition for Declaratory Ruling is inappropriate for the issues raised by APCC and should be denied. APCC's Petition for Declaratory Ruling is a disguised, untimely petition for reconsideration of the Commission's previous decisions regarding the Part 68 exemption for public telephones. The purpose of a declaratory ruling is to clarify an unclear or ambiguous rule or ruling. However, there is no lack of clarity or ambiguity here regarding the Part 68 exemption. It is well settled that both coin and coinless, "dumb" and "smart", public telephones are covered by the Part 68 exemption. Further, APCC has failed to present a developed set of facts to support its Petition.

2. Inmate public telephones are covered by the Part 68 exemption. APCC attempts to distinguish general public telephones from inmate public telephones on the basis that the latter are available only to a segment of the general public. Therefore, APCC would characterize inmate public telephones as CPE and the services provided over such telephones as enhanced services. There is no logical support for APCC's argument. The fact that

inmates are incarcerated does not negate their status as members of the general public. They are incarcerated for varying and often indeterminate periods of time - from a few days to a few years and they are denied the legal right to their own telephone service. Therefore, they have an even greater need than other members of the public to have access to public telephone services.

3. The offering of specialized features is consistent with the Part 68 exemption. APCC's claims that public telephones with specialized functionalities are CPE is both meritless and misleading. The Commission's decision in Tonka clearly allows the LECs to use "smart" telephone sets under the Part 68 exemption. Further, APCC's claim that the LECs are offering enhanced services over inmate public telephones is incorrect and misleading.

4. APCC's continued misstatements regarding inmate public telephones and its mischaracterization of Pacific Bell's response to the Santa Clara County RFP are misleading. Throughout its Petition, APCC misstates "facts" about inmate public telephones. Further, APCC's mischaracterization of statements in Pacific Bell's response to the Santa Clara County RFP wrongfully imply that Pacific Bell is providing enhanced services over its inmate public telephones.

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Services Providers Tasks Force)
for Declaratory Ruling) RM-8181

COMMENTS OF PACIFIC BELL AND NEVADA BELL

Pacific Bell and Nevada Bell (the "Pacific Companies") respectfully submit these comments on the Petition for Declaratory Ruling filed by the Inmate Calling Services Providers Task Force of the American Public Communications Council ("APCC") on February 2, 1993. APCC seeks a declaratory ruling from the Commission that pay telephones and systems ("public telephones") provided by local exchange carriers ("LECs") to correctional facilities for use by inmates ("inmate public telephones") are customer premises equipment ("CPE") which should be provided on an unregulated basis, subject to the Commission's Rules and Orders governing the provision of CPE.

I

A Petition for Declaratory Ruling is Inappropriate
for the Issues Raised by APCC and Should be Denied
APCC seeks a declaratory ruling from the Commission that:

1. Inmate public telephones - which generally are "dumb" telephone sets that utilize the intelligence, features and

functionality found in the LECs' regulated networks - are similar to customer-owned pay telephones ("COPT"), which generally rely on set-based features and functionality.¹

2. Similar to COPTs, inmate public telephones should be classified as CPE and removed from the Part 68 exemption for public telephones.

3. Certain of the "specialized" services offered in connection with inmate public telephones are enhanced and should be subject to the Commission's rules regarding enhanced services.

4. The Commission find that the LECs' current practices in connection with inmate public telephones are unlawful under the Computer II line of cases.

None of these issues is appropriate for consideration in the context of a petition for a declaratory ruling. The purpose of a declaratory ruling is to "terminate a controversy or remove uncertainty"; that is, to clarify an unclear or ambiguous rule or ruling. See 47 C.F.R. Section 1.2, In re BellSouth Petition, 6 FCC Rcd 3336, 3342 (Com.Car.Bur. 1991). As discussed below, there is no uncertainty surrounding the Commission's rules applicable to public telephones, inmate or otherwise.

The Commission's position on the Part 68 exemption for public telephones is clear and unambiguous and has been in place

¹COPT pay telephones are classified as CPE. See. e.g., Viking Electronics, 57 RR2d 133 (1984).

for at least eight years without successful challenge. Inmate public telephones were offered under the LECs' tariffs at the time the Part 68 exemption was adopted and have remained so since. Moreover, as APCC acknowledges in its Petition, the Commission already has addressed a petition for declaratory ruling once regarding public telephones. In re Tonka Tools, Inc. and Southern Merchandise Corp., 58 RR2d 903 (1985). In its Petition, APCC concedes, as it must, that:

"[in Tonka] [t]he Commission denied a request for a declaratory ruling that AT&T and the RBOCs were required to provide both coin and coinless pay telephones on an unregulated basis rather than as part of any basic transmission service. 58 RR2d at 911. The Commission affirmed the₂ exclusion for carrier-provided coin telephones."²

APCC goes on to misconstrue Tonka as a narrow decision. The fact is that the decision makes it even more clear that inmate public telephones are covered by the Part 68 exemption, because Tonka approved use of smart sets by the LECs on a regulated basis.³ Smart sets are public telephones with intelligence in the set. That intelligence enables the telephones to provide the very services at issue here.

In the instant case, there is no uncertainty regarding the classification of inmate public telephones. The LECs consistently have treated inmate public telephones as public or semi-public

²APCC Petition at page 11.

³Tonka, supra, at 910.

service. The Commission adopted Part 68 knowing this and did not single out inmate public telephones for special treatment. Tonka reaffirmed Part 68 in a manner that is fully consistent with the regulated treatment of inmate public telephones. Since this matter is well settled, a declaratory ruling is not warranted. See BellSouth, supra, 6 FCC Rcd at 3342 (petition for declaratory ruling denied because there is "no uncertainty where the Commission has previously considered and rejected a specific proposal advocated by the same petitioner").

Moreover, a petition for declaratory ruling is not appropriate here because APCC has not developed a clear and undisputed factual record upon which the Commission can base a decision. In re American Network, Inc., 4 FCC Rcd 550, 551-52 (Com.Car.Bur. 1989) ("A declaratory ruling may be used to resolve a controversy if the facts are clearly developed and essentially undisputed. A petitioner in such a proceeding must provide sufficient information to enable the Commission to resolve the controversy in a meaningful manner.") The Pacific Companies dispute APCC's claims (1) that inmate public telephones are not pay telephones and (2) that the services offered over inmate public telephones are enhanced services. The Pacific Companies also dispute the characterization by APCC of its response to the Santa Clara County Request for Proposal ("Santa Clara County RFP"). See infra. The factual record, as presented by APCC needs

to be rectified before the Commission can be in a position to issue a declaratory ruling.

The Pacific Companies believe that APCC is, in fact, asking the Commission for untimely reconsideration of its previous decisions regarding the Part 68 exemption for public telephones. APCC should either have pursued a timely petition for reconsideration of the Commission's decisions or filed a timely petition for review with the Court of Appeals. In re PSC of Maryland, 4 FCC Rcd 4000, 4004 (1989) ("An interested person who believes an unambiguous Commission decision is incorrect ... should either file a timely petition for reconsideration ... or a timely appeal ... Such persons should not attempt to use a petition for declaratory ruling as a substitute for a petition for reconsideration.") (Emphasis added)

Since APCC has failed to provide sufficient facts to support a petition for declaratory ruling and since Part 68 clearly and unambiguously exempts inmate public telephones from Part 68, the Pacific Companies respectfully request that the Commission deny APCC's Petition for a Declaratory Ruling.

II

Inmate Public Telephones are Covered by the Part 68 Exemption

Briefly, APCC's primary argument as to why inmate public telephones should be distinguished and treated differently from other public telephones is that inmate public telephones are

available only to inmates of correctional facilities and not to the general public. However, as the Commission noted in Tonka, public telephones serve "the general public or some segment thereof." Tonka, supra, at 910. (Emphasis added.)

Although incarcerated, inmates do not cease being members of the general public. Indeed, because they are legally denied the right to their own telephone service, they are in need of public telephone services more than other segments of the general public. The fact that some inmates may be less transient than others does not support the distinction urged by APCC. Whether incarcerated only a few hours while bail is posted or serving a term of years, inmates are transient members of the general public. Save for those few inmates serving life sentences, a correctional facility is not an inmate's permanent residence.

APCC attempts to analogize inmate public telephones to the coin or coinless telephones in hotel, hospital and university dormitory rooms which are treated as CPE. The analogy fails, however, since calls from those telephones are billed to the user's room, while calls generated by inmates are billed to the called party on a call-by-call basis. Further, there is a telephone in each hotel or dormitory room. However, inmate public telephones - like all public telephones - usually are grouped together in a common area (however controlled) and are shared by those having access to that common area.

The fact, as APCC states,⁴ that the Commission has noted a distinction between general public telephones and inmate public telephones⁵ in no way changes or overrules the general Part 68 exemption for public telephones, including inmate public telephones. The exemption simply recognized that the safeguards imposed by TOCSIA were not meaningful to this segment of the pay telephone-using public.

The fact that inmate public telephones may be available to users under controlled conditions does not compel a finding that they are CPE. In this regard, inmate public telephones are more similar to the semi-public telephones available to employees only in the break room of a fast-food restaurant than they are to telephones in hotel, hospital and dormitory rooms.

III

The Offering of Specialized Features is Consistent with the Part 68 Exemption

APCC also seeks to distinguish inmate public telephones from other public telephones by describing various "specialized" functions performed by inmate public telephones that are not

⁴APCC Petition at page 12.

⁵See Report and Order in CC Docket No. 90-313, Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 2744 (1991), recon. denied in part and clarified in part, 7 FCC rcd 3882 (1992).

performed by the other public telephones. APCC claims, among other things, that inmate public telephones provide "highly specialized functions and features required by correctional facilities" that are not required by the general public. APCC goes on to state that the "specialized services [provided by the inmate public telephones] have been developed to meet the calling needs of inmates and are also directly responsive to the specialized requirements of correctional officers and administrators."⁶

APCC also notes that "[m]any correctional facilities limit the type of calls which can be placed from inmate-only phones to collect calls only"⁷ and that the telephone "system generally must be capable of restricting calls by time of day, or by call duration."⁸ APCC further notes that "[i]nmates are often required to use a PIN number in order to place a call."⁹ APCC goes on to discuss other restrictions or features frequently requested by correctional facilities in connection with the provision of inmate public telephones. APCC summarizes, on page

⁶APCC Petition at page 3.

⁷Id. at page 4.

⁸Id. at page 5.

⁹Id. APCC refers to Pacific Bell's response to the Santa Clara County RFP as the support for this statement. As discussed below, this reference is misleading.

15,¹⁰ that "specialized functionality which involves subscriber action with stored information is not only sufficient to clearly categorize inmate-only phones and phone systems as CPE; it falls under the definition of enhanced services, which should also be provided on an unregulated basis."

APCC's claims are both meritless and misleading. Throughout its Petition, as described above, APCC implies or claims outright that the various features and functionality it describes reside in the telephone set or in equipment owned by the LECs on the premises of correctional facilities. In the case of the Pacific Companies, however, the features and functionality offered in connection with their inmate public telephones generally reside in the network. The Pacific Companies provide from the central office the new, specialized functionalities which APCC appears to describe in its Petition. However, with respect to both of the Pacific Companies, some of the functionality does reside in the set. These specialized cases are limited to the situation where a specific facility's public telephone needs do not warrant the expense of size-sensitive network functionality.

Contrary to APCC's assertion, the Pacific Companies do not place any hardware between their inmate public telephones and their regulated networks other than the type of equipment that was included under the public telephone definition at the time

¹⁰Footnote 26.

the Part 68 waiver was written. Pacific Bell generally provides the specialized functionality through its Inmate Call Control Unit ("ICCU"), which resides in the central office.¹¹ APCC's Petition also is misleading to the extent that it suggests that the LECs are offering enhanced services, and that something is wrong with that.¹² In fact, the Pacific Companies are not offering enhanced services. Services such as speed dialing, call forwarding and the other inmate services clearly are adjunct to basic. However, if the Pacific Companies decided to offer an enhanced service to inmates, such a service would be permissible

¹¹While Pacific Bell is offering its inmate functionality from the central office, it also could have offered it from the inmate public telephones and still been consistent with the Part 68 exemption. Tonka clearly allows the LECs to use smart sets under the exemption. As the Commission noted in Tonka, "[i]n considering the applicability of Computer II to the newer, more innovative and technologically advanced coin and coinless pay telephones, some of which do not rely upon central office facilities and interaction, we conclude that the pay telephone exclusion does not rest upon considerations of technical severability alone. Regardless of the method of payment or operational characteristics of these newer devices, they have not changed in one important respect; the equipment and transmission capacity are not logically severable. Pay telephones provided by carriers subject to regulation have historically been accorded special regulatory status because they serve the public service role of ensuring pay telephone service is available to the transient, mobile public, and they have as their primary customer or user the general public. Even if the telephone company describes the service as 'semi-public' and collects a charge from a subscriber such as a bar or restaurant the primary customer of this pay telephone equipment for Computer II regulatory purposes is still the general public or some segment thereof ... The instrument and the pay telephone service are not severable from that customer's perspective." 58 RR2d 903, 910. (Emphasis added.)

¹²APCC Petition at page 20.

so long as they complied with the applicable regulatory rules. There is no basis for an argument that a properly provisioned enhanced service offered over a LEC public telephone compromises the Part 68 exemption for public telephones.

IV

APCC's Continual Misstatements Regarding Inmate Public Telephones and its Mischaracterization of Pacific Bell's Response to the Santa Clara County RFP are Misleading

At page 3 of its Petition, APCC claims that "[i]nmate-only telephone systems have a number of specialized functionalities not needed or used in payphones or aggregator phones made available to the public in general." At page 5, APCC claims that "[i]nmates are often required to use a PIN number in order to place a call." A footnote refers to Pacific Bell's response to the Santa Clara County RFP. Further down on page 5, APCC states that "[t]ypically, inmate-only phone systems must include call recording and monitoring capabilities on a selective basis." At page 6, APCC claims that call detail information is required for use in investigations. APCC also alleges, on the same page, that public telephones typically do not restrict the type of calls that can be made to collect calls only, restrict the length of a call or block access to particular numbers. On page 7, APCC claims that Pacific Bell's response to the Santa Clara County RFP proposed the provision of a facsimile machine and an answering machine. At page 8, APCC claims that Pacific Bell proposed to

provide Santa Clara County with recording and monitoring equipment.

With respect to APCC's claim on page 3, it is true that the Pacific Companies' telephone systems may offer specialized functionalities. However, their telephones do not. With respect to APCC's first claim on page 5 referred to above, Pacific Bell does not have the capability to provide a PIN number feature. Regarding the second claim on page 5, Pacific Bell did not provide Santa Clara County with any recording and monitoring equipment. However, if it wished to do so, it could provide such equipment.

Regarding APCC's claim on page 6, the Pacific Companies only provide call detail information under procedures established by state law. With respect to the other claim on the same page, Pacific Bell does restrict the type and length of calls that can be made from certain public telephones, including both inmate and general public telephones. In addition, Pacific Bell has approximately 1,000 "Charge-a-Call" public telephones, in locations other than correctional facilities, which do not allow for coin payment.

With respect to APCC's claim on page 7 of its Petition, Pacific Bell provides and accounts for equipment such as facsimile and answering machines on a deregulated basis. In response to APCC's claim on page 8, Pacific Bell did not provide Santa Clara County with recording and monitoring equipment.

Conclusion

APCC has not made any showing that it has or will suffer competitive harm from the continued exemption from Part 68 of all public telephones. Further, as discussed above, APCC has either misunderstood or mischaracterized the Commission's rules regarding public telephones in general and the features and services Pacific Bell makes available to its customers for inmate telephone services in particular. Therefore, the Pacific Companies respectfully request the Commission to deny the APCC Petition.

Respectfully submitted,

PACIFIC BELL
NEVADA BELL

A handwritten signature in black ink, reading "Maribeth R. Evans". The signature is written in a cursive style with a large, stylized "M" and "E".

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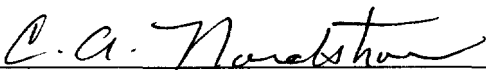
Date: March 8, 1993

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "COMMENTS OF PACIFIC BELL AND NEVADA BELL IN RESPONSE TO THE PETITION FOR DECLARATORY RULING, RM-8181" was served by United States first-class mail, postage prepaid, to the party listed below on this 8th day of March, 1993.

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